The University of the State of New York

The State Education Department
State Review Officer
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No. 18-046

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Clarkstown Central School District

Appearances:
Park, Jensen, Bennett, LLP, attorneys for petitioner, by Tai H. Park, Esq. and Mehtab K. Brar, Esq.

Jaspan Schlesinger, LLP, attorneys for respondent, by Carol A. Melnick, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the Hawk Meadow Montessori School (Hawk Meadow) for the 2014-15, 2015-16 and 2016-17 school years and the New York Military Academy (NYMA) for the 2017-18 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has been the subject of two prior State-level appeals (see Application of a Student with a Disability, Appeal No. 17-099; Application of a Student with a Disability, Appeal No. 14-161). Due to the nature of the disposition in this case, the parties' familiarity with the facts and procedural history is presumed and will not be repeated here in detail. The student began attending a district elementary school for the 2007-08 school year (kindergarten), and at the end of the 2009-10 school year (second grade) a CSE determined that the student was eligible for

special education and related services as a student with an other health impairment related to his academic needs and attention difficulties (Dist. Ex. 4 at pp. 1-2). He continued to attend a district elementary school through the 2011-12 school year (Dist. Exs. 4 at p. 2; 7 at p. 1). For the 2012-13 school year (fifth grade), the parent unilaterally placed the student at Hawk Meadow, a non-approved nonpublic school located outside the district of residence, which he continued to attend through the 2016-17 school year (Parent Exs. Q at p. 2; EEE at pp. 2, 4, 6; Dist. Ex. 12).

While the student continued attending Hawk Meadow for fifth through ninth grade, the district of residence continued proposing IEPs and placements in the public school for most of those school years. With regard to the 2013-14 school year (sixth grade), the parties disputed in prior litigation whether an IEP should have been or was actually completed by the district. However, as noted in Application of a Student with a Disability, Appeal No. 14-161, the undersigned found in favor of the parent that the district did not satisfy its obligation to complete an appropriate IEP.

On August 28, 2014 the CSE from the district of residence convened and, for the 2014-15 school year (seventh grade), recommended that the student attend a general education class and receive integrated co-teaching (ICT) services, instruction in a special class for reading, and occupational therapy (OT) (Dist. Ex. 14 at pp. 7-8). Additionally, the CSE reconvened on September 15, 2014, changed the student's eligibility category to learning disability, and added counseling services to the student's IEP (Dist. Ex. 21 at pp. 1-2, 8).[1]

For the 2015-16 school year (eighth grade), the CSE from the district of residence convened on August 26, 2015 without the parent in attendance and its recommendations remained largely unchanged from the September 2014 IEP; however, the August 2015 CSE removed the student's special class for reading and recommended a resource room program (compare Dist. Ex. 29 at pp. 1, 8, with Dist. Ex. 21 at pp. 1, 8).

With respect to the 2016-17 school year (ninth grade), the CSE from the district of residence convened on June 22, 2016 without the parent in attendance and similar to the August 2015 IEP, the program recommendations remained largely unchanged (compare Dist. Ex. 37 at pp. 1, 8, with Dist. Ex. 29 at pp. 1, 8).

Regarding the 2017-18 school year, the CSE from the district of residence convened on May 31, 2017 without the parent in attendance (Dist. Ex. 41 at pp. 1, 3). Compared to the June 2016 IEP, the recommendations for programming in the student's IEP remained unchanged (compare Dist. Ex. 41 at pp. 1, 7-8, with Dist. Ex. 37 at pp. 1, 8).

On August 21, 2017, the parent signed an enrollment contract for the student's attendance for the 2017-18 school year at NYMA, a college preparatory military school for day and boarding

[1] Although meeting information attached to the September 2014 IEP indicated the CSE discussed changing the student's eligibility category from other health impaired to learning disability at that meeting, the August 2014 IEP reflects that the student was eligible for special education and related services as a student with a learning disability (compare Dist. Ex. 14 at p. 3, with Dist. Ex. 21 at pp. 1-2).

students, (Dist. Exs. 49 at p. 1; 51 at pp. 1-4). The student repeated the ninth grade at NYMA during the 2017-18 school year (Tr. pp. 1490-91).

A. Due Process Complaint Notice

In a due process complaint notice dated October 4, 2017, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15, 2015-16, 2016-17, and 2017-18 school years (Parent Ex. AA). Specifically, for the 2014-15 school year, the parent alleged that although the student's classification was changed, the content in the 2014-15 IEP remained unchanged (id. at p. 3 n.2).

With respect to the 2014-15, 2015-16 and 2016-17 school years, the parent alleged numerous claims that applied to all three years (Parent Ex. AA at p. 3 n.2). First, the parent alleged that the student did not have "valid IEPs" prior to the start of each school year and the IEP "implementation dates" predated the district's Board of Education meetings (id.). Further, the parent alleged that she was denied the opportunity to participate in the decision-making process for the student's three IEPs because she was not provided notice of CSE meetings regarding the student (id.). Next, the parent alleged that the CSE relied on "stale information and testing" and failed to use relevant reports and evaluations in developing those three IEPs for the student (id.). Additionally, the parent alleged that the student's IEPs for the 2014-15 through 2016-17 school years were "word-for-word identical" year after year and the district failed to develop IEPs to address the student's academic, physical and social emotional needs (id.). Next, the parent alleged that the three IEPs failed to include a scientifically-based methodology for the student or meaningful annual goals (id.). Further, the parent alleged that the student's "services and placement" for the 2014-15 through 2016-17 school years were not the student's least restrictive environment (LRE) (id.).

Specifically, for the 2016-17 school year only, the parent alleged that the district failed to timely conduct a triennial reevaluation for the student (Parent Ex. AA at p. 3 n.2).

With respect to the 2017-18 school year, the parent asserted that the district retaliated against her for pursuing federal litigation and protecting the student's rights arising out of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794[a]) (section 504) and the Americans with Disabilities Act (ADA) (Parent Ex. AA at p. 5). Similar to previous school years, the parent asserted that that she was denied the opportunity to participate in the decision-making process for the student's May 2017 IEP because she did not receive notice of the May 2017 CSE meeting (id.). In addition, the parent asserted that she received the prior written notice and procedural safeguards from the May 2017 CSE meeting after four months, in September 2017 (id.). Next, the parent asserted that the 2017-18 school year IEP was not appropriate because it was identical to the 2016-17 IEP and the CSE used stale reports and evaluations in preparing the IEP (id. at p. 7). The parent alleged that the district violated the pendency provisions of the IDEA and sought "[i]mmediate" transportation for the student to and from NYMA because the district refused to provide the student with transportation beginning September 25, 2017 (Parent Ex. AA at pp. 1 n.1, 10).

The parent additionally argued that NYMA was an appropriate unilateral placement because it provided educational instruction specially designed to meet the student's needs (Parent

Ex. AA at p. 8). The parent also argued that equitable considerations weighed in her favor with respect to awarding the student full reimbursement for the student's cost of attendance at NYMA because she cooperated with the CSE and made efforts to meaningfully participate in the CSE process (id.).

As relief, the parent requested (1) that the district be directed to provide the student with transportation services to and from NYMA for the 2017-18 school year under pendency (stay put); (2) the district be ordered to pay tuition reimbursement for NYMA for the 2017-18 school year; (3) "prospective reimbursement" for NYMA during pendency; (4) an order for prospective transportation to and from NYMA for the 2018-19 through 2020-21 school years; (5) an order directing reimbursement for out-of-pocket expenses and lost wages related to the district's failure to provide transportation to and from NYMA from September 25, 2017 until transportation resumes; (6) an order directing the district to pay tuition reimbursement for Hawk Meadow for the 2014-15 through 2016-17 school years; (7) an order directing the district to provide compensatory education in the form of tutoring or any additional necessary support services; (8) a finding that the district retaliated against the parent under section 504 and ADA; (9) an order directing attorney's fees and costs; and, (10) any other relief deemed just and proper by the IHO (Parent Ex. AA at p. 10).

B. Impartial Hearing Officer Decision

On October 31, 2017, the parties proceeded to an impartial hearing, which concluded on December 15, 2017 after six days of proceedings (Tr. pp. 1-1546). By decision dated March 7, 2018, the IHO found that the parent's claims related to the 2014-15 and 2015-16 school years were time-barred by the IDEA's statute of limitations (IHO Decision at p. 8). Next, the IHO concluded that the district offered the student a FAPE for the 2016-17 and 2017-18 school years (id. at pp. 18-20, 25-26).[2] The IHO determined that the district kept records and made numerous attempts to notify the parent of the June 2016 CSE meeting and to obtain consent to conduct a triennial evaluation of the student without success, but that the district did not significantly impede the parent's participation in the process (id. at p. 17). With respect to the 2016-17 school year, the IHO found that the district developed an appropriate IEP to meet the student's needs (id. at p. 18). The IHO also found that Hawk Meadow was not appropriate to meet the student's needs because it was "too restrictive" and did not offer the student a setting with age appropriate peers or with an environment that offered the student a wide range of academic and social opportunities (id. at p. 19). Lastly, the IHO found that equitable considerations favored the district (id. at p. 20).

With respect to the 2017-18 school year, the IHO determined that the parent was given an opportunity to participate during the development of the student's May 2017 IEP, but repeatedly refused (IHO Decision at pp. 23, 25). The IHO further found that any procedural errors regarding the May 2017 CSE's inability to obtain updated information was due to the parent's failure to

[2] Additionally, in an interim decision dated October 19, 2017, the IHO rejected the parent's claim for transportation to and from NYMA while the impartial hearing was pending (IHO Ex. 1 at p. 3). The IHO found that although the student was previously receiving transportation to and from Hawk Meadow under pendency, "the student's placement has changed for the 2017-18 school year and he no longer attends the Hawk Meadow School" (id. at pp. 2-3).

provide consent (id.). Although the IHO did not make a direct finding as to the appropriateness of NYMA, the IHO found that the student's academic, work and study habit "remedial areas" did not require a "residential and restrictive" placement (id.). Lastly, the IHO denied the parent's request for transportation and out-of-pocket expenses for emergency interim boarding (id. at p. 26).

IV. Appeal for State-Level Review

The parent appeals from the IHO's March 2018 decision. Initially, the parent asserts that the IHO erred in finding her claims related to the 2014-15 and 2015-16 school years were time-barred. The parent asserts that she was pursuing tuition reimbursement for the 2014-15 and 2015-16 school years based on pendency "which is not subject to a time-bar." Regarding the 2015-16 school year, the parent asserts that the district failed to offer the student a FAPE because the 2015-16 IEP was deficient both procedurally and substantively. The parent argues that the 2015-16 IEP was procedurally deficient because the CSE failed to provide the parent with notice of the CSE meeting, the district failed to provide the student with a timely IEP, and the IEP was based on outdated information. The parent further argues that the 2015-16 IEP was substantively deficient because the IEP was similar to the prior years and contained outdated information. The parent also argues that the district failed to rely upon updated information obtained by the district of location. Additionally, the parent argued that the program recommendation was not appropriate. Next, the parent alleges that Hawk Meadow was an appropriate unilateral placement for the student because it met the student's individual educational needs. The parent also alleges that equities weigh in her favor for tuition reimbursement because she would have participated in CSE meetings had she been notified and, in addition, she executed valid consent for the district of location to share all of the student's information with the district of residence.

With respect to the 2016-17 school year, the parent contends that the student's 2016-17 IEP was procedurally deficient because the district made no effort to ensure that she received notice of the CSE meeting and the parent received the IEP after the school year began. The parent asserts that the 2016-17 IEP was substantively deficient because the IEP was identical to the 2015-16 IEP and contained outdated evaluations and test results. The parent also asserts that the IHO erred in finding that she did not provide consent for the student's triennial reevaluation. Further, the parent argues that the IEP was deficient because the program recommendation was not appropriate. Next, the parent maintains that Hawk Meadow was an appropriate unilateral placement and that equities weigh in her favor for tuition reimbursement.

For the 2017-18 school year, the parent requests an order requiring the district to provide the student with transportation to and from NYMA for the 2017-18 school year based on pendency. The parent also requests tuition reimbursement and transportation based on the district's failure to offer the student a FAPE. The parent argues that the district failed to notify her of the CSE meeting and that she did not receive prior written notice. Further, the parent argues that the IEP was outdated and based on stale information from the previous year. In addition, the parent argues that the CSE did not adequately address transitional planning for the student. Next, the parent argues that the IEP included inappropriate recommendations for the student. The parent argues that NYMA was an appropriate unilateral placement and equities weigh in her favor for tuition reimbursement.

In an answer, the district asserts that the parent's appeal should be dismissed because it was untimely in violation of State regulations. The district also responds to the parent's substantive allegations and generally argues to uphold the IHO's decision in its entirety.

In a reply, the parent requests that the SRO excuse the untimely service of the request for review on the district based on good cause. The parent also asserts that although she unilaterally placed the student at Hawk Meadow, the district was still required to develop an appropriate IEP. Additionally, the parent asserts that although the district noted that she did not produce any "itemized expenditures" for transportation, tuition or other expenses, "itemized expenditures" are not required by the IDEA.

V. Applicable Standards & Discussion

Based on the reasons set forth below, the parent's appeal must be dismissed for non-compliance with the regulations governing practice before the Office of State Review. An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see, e.g., Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service in a timely manner]; Application of the Dep't of Educ., Appeal No. 12-120 [dismissing a district's appeal for failure to timely effectuate personal service on the parent). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline for good cause shown (8 NYCRR 279.13). The reasons for the failure must be set forth in the request for review (id.). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012]).

In this case, the parents failed to initiate the appeal in accordance with the timelines prescribed in Part 279 of State regulations. The IHO's decision is dated March 7, 2018 (IHO Decision at p. 26). The parent was, therefore, required to personally serve the request for review upon the district no later than April 16, 2018 (see 8 NYCRR 279.2[b]). However, the request for review, which was dated April 16, 2018, was served upon the district on April 17, 2018 (see Parent Aff. of Service).[3] Accordingly, the service of the request for review upon the district was untimely. Furthermore, while an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the time specified for good cause shown, the reasons for the failure must be set forth in the request for review (see 8 NYCRR 279.13). In this case, the parent failed to assert good

[3] The parent's verification was dated April 14, 2018, two days earlier than the request for review.

cause for the failure to timely initiate the appeal—or any cause whatsoever—in her request for review.[4] Accordingly, the parent has not complied with the procedural requirements for timely personal service initiating an appeal or the procedure for seeking excusal of a late request for review and the appeal must be dismissed.[5]

Even assuming that the parent had set forth good cause for the failure to timely seek review in the request for review, the reason stated in this case—that the process serving agency served the request for review one day late—does not constitute good cause. Emails attached to the parent's reply show that a paralegal with parent's counsel sent an email to the process serving agency attaching the documents to be served on April 16, 2018, the last day to timely serve the district. There are no instructions from the parent's counsel indicating that it was a deadline. Thus, the process serving agency did not serve the district until the following day, April 17, 2018, because the process server was "not aware of the April 16th deadline" (Reply Ex. B at p. 2). Waiting until the last day to execute a pleading and effectuate personal service while providing minimal instructions to a process server does not constitute a matter outside the control of a party, especially where, as here, the only explanation is that the process server was not aware that the date is the last day for service. Consequently, even if the request had been contained in the request for review, the parent's allegation of good cause would nevertheless be insufficient to excuse the failure to timely serve the request for review upon the district (8 NYCRR 279.13; see New York City Dep't of Educ. v. S.H., 2014 WL 572583, at *5-7 [S.D.N.Y. Jan. 22, 2014] [upholding SRO's decision to reject petition as untimely for being served one day late and noting that it was foreseeable that difficulties might arise when attempting to effectuate service on the day service was due]; B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-67 [S.D.N.Y. 2013]; T.W., 891 F. Supp. 2d at 440-41 [informing counsel for the parents that "an examination of pertinent SRO decisions would have informed her that delays due to scheduling difficulties or lack of availability on the

[4] The parent's assertion that this case is unlike Application of the Bd of Educ. of the Harborsfield Cent. Sch. Dist., Appeal No. 10-044 and Application of a Student with a Disability, Appeal No. 09-099 is without merit. In both cases, as in this case, the appealing party failed to set forth good cause in their pleading, at that time called the "petition" for review, and the SRO determined that when the request for excusal of the delay and good cause was not set forth in the petition "there is no basis upon which to excuse the delay" (Application of the Bd of Educ. of the Harborsfield Cent. Sch. Dist., Appeal No. 10-044). In this case, counsel for the parents were explicitly notified by Office of State Review staff in writing on April 9, 2018 that "[i]f the parent is unable to timely serve a request for review, good cause for the failure to timely serve and file must be set forth in the request for review in addition to the parent's challenges to the impartial hearing officer's decision (8 NYCRR 279.13)" [emphasis added].

[5] In a letter dated April 17, 2018 to the Office of State Review accompanying the filing of the request for review, the parent's attorney indicated that his firm instructed the process serving agency to serve the request for review upon the district on April 16, 2018 but that the process serving agency served the request for review upon the district on April 17, 2018, one day late. Even if the contents of the letter could be relied upon as facts that constituted good cause to excuse a late request for review, the addition of this written material to the request for review would push the pleading past the page limitations. The practice regulations explicitly prohibit pleading practices that have the effect of circumventing the page-limitations (see 8 NYCRR 279.8[b]). Also, as a cautionary note for future pleadings, a request for review must also be presented "with each issue numbered and set forth separately" when issues are presented for review that are grounds for reversal or modification of an IHO's decision. In this case, the pleading merely numbers every paragraph, regardless of whether or not it presents an issue for review. That practice is not compliant with the practice regulations. The numbering of paragraphs is acceptable, provided the issues advanced for review are clearly and separately enumerated.

part of parties or counsel are not typically found to be 'good cause' for untimely petitions"]; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *4-*5 [Sept. 25, 2009] [upholding dismissal of a petition served three days late]). Therefore, based upon the parent's failure to properly initiate the appeal and the absence of good cause for untimeliness, I exercise my discretion and dismiss the request for review as untimely.

VI. Conclusion

Having found that the parent failed to timely initiate the appeal, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 17, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER